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IN THE

Supreme Court of the United States

October Term, 1975.

Nos. 75-436 and 75-437

JAMES L. BUCKLEY et al.,

Appellants,

v.

HON. FRANCIS R. VALEO et al.,

Appellees.

On Appeal From the United States Court of Appeals for the District of Columbia and the United States District Court for the District of Columbia.

BRIEF OF THE FEDERAL ELECTION COMMISSION.

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Nos. 75-436 AND 75-437.

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JAMES L. BUCKLEY ET AL.,
Appellants,

v.

HON. FRANCIS R. VALEO ET AL.,
Appellees.

—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

—

BRIEF OF THE FEDERAL ELECTION COMMISSION.

QUESTION PRESENTED.

The Commission's separate brief is addressed to the issues embraced in Question 8 of the certified questions, reading as follows: [1]

8. Do the provisions in the challenged statutes concerning the powers and method of appointment of the Federal Election Commission violate the rights of one or more of the plaintiffs under the constitutional separation of powers, the First, Fourth, Fifth, Sixth, or Ninth Amendments, Article I, Section 2, Clause 6, Article I, Section 5, Clause 1, or Article III?

1. The Commission's position with respect to the other certified questions is set forth in the brief filed on its behalf by the Department of Justice.

(a) Does 2 U. S. C. § 437(a) violate such rights by the method of appointment of the Federal Election Commission?

(b) Do 2 U. S. C. §§ 437d and 437g violate such rights, in that they entrust administration and enforcement of the FECA to the Federal Election Commission?

(c) Does 2 U. S. C. § 437g(a) violate such rights, in that it empowers the Federal Election Commission and the Attorney General to bring civil actions (including proceedings for injunctions) against any person who has engaged or who may engage in acts or practices which violate the Federal Election Campaign Act, *as amended*, or § 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18?

(d) Does 2 U. S. C. § 438(c) violate such rights, in that it empowers the Federal Election Commission to make rules under the FECA in the manner specified therein?

(e) Does 2 U. S. C. § 456 violate such rights, in that it imposes a temporary disqualification on any candidate for election to federal office who is found by the Federal Election Commission to have failed to file a report required by Title III of the Federal Election Campaign Act, *as amended*?

(f) Does § 9008 of the Internal Revenue Code of 1954 violate such rights, in that it empowers the Federal Election Commission to authorize expenditures of the national committee of a party with respect to presidential nominating conventions in excess of the limits enumerated therein?

STATUTE INVOLVED.

The provision governing the establishment and composition of the Commission (2 U. S. C. § 437c) reads as follows:

> There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives, ex officio and without right to vote, and 6 members appointed as follows:
>
> (A) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President pro tempore of the Senate upon the recommendations of the majority leader of the Senate and the minority leader of the Senate;
>
> (B) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the Speaker of the House of Representatives, upon the recommendations of the majority leader of the House and the minority leader of the House; and
>
> (C) two shall be appointed, with the confirmation of a majority of both Houses of the Congress, by the President of the United States.
>
> A member appointed under subparagraph (A), (B), or (C) shall not be affiliated with the same political party as the other member appointed under such paragraph.

The various provisions bearing on the powers and functions of the Commission are set forth in the statutory pamphlet ("Federal Election Campaign Laws"), copies of which have been lodged with the Court.

STATEMENT.

The history of these proceedings is set forth in the brief filed by the Department of Justice. We confine ourselves here to a summary statement of the court of appeals' rulings on the issues embraced in Question 8.

Addressing itself to the question whether the Commission is unlawfully constituted because only two of its members are appointed by the President, the court below first observed (J. S. 1508) that the Commission is "essential to the effective functioning of the overall scheme," that the area in which it is operating is "novel and complex," and that its existence as an agency ought not to be terminated unless "wholly without legitimacy in the very terms in which it is brought into being." The court ruled further that Article II, Section 2, of the Constitution does not bar the appointment of inferior civil officers by the Legislative Branch when the officers will be engaged in the performance of dominantly legislative functions; that Congress has broad and pervasive responsibilities with respect to the conduct and control of federal elections and the prevention of corruption in the electoral process; and that Congress "draws sufficient authority from the necessary and proper clause of the Constitution" to create a Commission to aid it in the execution of those responsibilities (J. S. 1573). "We thus conclude," the court stated (*ibid.*), "that Congress has the constitutional authority to establish and appoint the Federal Election Commission to carry out appropriate legislative functions."

Recognizing that, in addition to its primary legislative functions, the Commission is authorized by certain of the statutory provisions to perform tasks that may be characterized as quasi-executive or quasi-judicial, the court reasoned that this alone does not render those provisions invalid. It must be asked whether the particular function

is sufficiently related to, or is ancillary to, an appropriate legislative function. For the most part, the court found plaintiffs' challenges to specific powers of the Commission not ripe for adjudication. This litigation, it observed (J. S. 1576), "does not present the court with the concrete facts that are necessary to an informed decision." The reach of the Commission's powers in numerous particulars, it noted, has not been administratively determined. Powers arguably granted are still unexercised and no one is adversely affected. ". . . [S]ome of the issues presented to us . . . may never reach a stage at which they would be ripe for adjudication" (*ibid.*).

The court did find, however, that two issues relating to the exercise of delegated powers were sufficiently ripe for consideration. It considered and upheld (see Question 8(b)) the Commission's authority to issue advisory opinions ("We discern no constitutional barrier that would prevent a legislative agency from informing the public of its interpretation of the statutory provision it must administer" (J. S. 1579)). It likewise adjudicated the claim (see Question 8(f)) that the Commission is granted excessive discretion insofar as it is permitted to authorize nominating convention expenditures in excess of $2 million. Construing the statute to authorize excess amounts only where "due to extraordinary and unforeseen circumstances . . . the national committee is unable to provide the services actually needed to run the convention without exceeding the statutory limit" (J. S. 1580), the court held that there were sufficient guidelines to withstand a constitutional challenge of vagueness.

INTRODUCTION AND SUMMARY.

This brief defends the legitimacy of the means chosen by Congress to establish the Federal Election Commission (the method of appointment) and the propriety of granting it various powers and functions delegated by the campaign legislation. Appellants contend that the scheme of appointment impinges on the President's powers of appointment as set forth in Article II, § 2, cl. 2 of the Constitution.[2] They also urge that various of the Commission's activities will violate the principle of separation of powers because the agency is called upon to perform quasi-executive and quasi-judicial, as well as quasi-legislative, functions.[3]

We argue, in response, as follows. *Firstly,* we point out that Article II, Section 2, of the Constitution is not preclusive of Congressional authority to exercise appointive power when the functions of the appointees are dominantly or substantially related to the performance of Congressional responsibilities. *Secondly,* we demonstrate that the Constitution confers upon the Congress broad and pervasive responsibilities in relation to the federal electoral process

2. "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

3. We agree with the court of appeals' conclusion that most of the challenges addressed to the Commission's powers are premature, and that the courts ought not attempt to adjudicate the reach of the Commission's powers in advance of concrete action taken by the Commission affecting the complaining litigants. To the extent that we deal with issues relating to the Commission's powers not reached by the court below, we do so because of the possibility that this Court may adopt somewhat differing views as to which of the numerous issues raised by appellants are sufficiently ripe to warrant consideration.

and that these embrace, in addition to Congress' legislative role, auxiliary powers of a quasi-judicial and quasi-executive character. *Thirdly,* we urge that an examination of the functions entrusted to the Commission shows that it will be acting as Congress' delegate in the performance of tasks that are a Congressional responsibility or are incidental to the discharge of that responsibility. Appellants' challenges to the Commission's powers are in large part premature and in no event well founded. *Finally,* we argue that, in light of the above, Congress' role in making four of the six appointments to the Commission on a bipartisan basis is neither incongruous nor violative of the doctrine of separation of powers.

Before reaching the merits, however, there is an important threshold question to be addressed: Whether these private appellants may challenge the composition and authority of the Commission on the ground that the President's appointive prerogatives have been impinged, when no such claim has been presented on behalf of the Excutive.[4]

4. In the court below, as here, the Department of Justice supported the Commission. The Attorney General did express reservations as to the role the Commission could properly play in the realm of civil enforcement, noting, however, that it was not clear, in light of the statutory structure, what role the Commission actually would perform in the area of enforcement and that the question was therefore premature.

ARGUMENT.

I.

Appellants Have No Cognizable Interest in Congress' Alleged Impingement Upon Presidential Powers.

Appellants urge that Congress has trenched upon the President's powers under Article II of the Constitution to appoint inferior officers, although the President signed the legislation which provided for the appointment of the members of the Federal Election Commission. Since there is no basis for any claim that Congress' appointees to the Commission lack the qualifications prescribed by the legislation, the situation is one in which private plaintiffs are seeking to litigate the validity of a provision which goes solely to the allocation of the appointive power between the Executive and the Legislative Branches. The constitutional provision which appellants invoke was not enacted for their benefit or protection, and its alleged violation here threatens them with no injury, either immediate or remote. Insofar as appellants claim that the President's powers are infringed, they are asserting that they "suffer in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U. S. 447, 488, reaffirmed in *United States v. Richardson*, 418 U. S. 166, 173. They would "employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System," *Flast v. Cohen*, 392 U. S. 83, 106. As *Flast* further explains (392 U. S. at 99-100), "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *See also Tileston v. Ullman*, 318 U. S. 44, to the effect that one

may not claim standing to vindicate the asserted constitutional rights of someone else. Repeatedly, the courts have insisted upon a showing of direct and personal injury—a requirement that fulfills several purposes. A "personal stake in the outcome of the controversy" serves to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker v. Carr*, 369 U. S. 204. It insures against premature and unnecessary constitutional adjudication. *Schlesinger v. Reservists Committee*, 318 U. S. 208; *O'Shea v. Littleton*, 414 U. S. 488. Finally, these considerations are "especially important when the relief sought produces a confrontation with one of the coordinate branches of the government," *Schlesinger, supra*, at 222.

Two of this Court's decisions are especially worthy of note in that they, too, involved a constitutional challenge by a private plaintiff to an official's capacity to serve. In *Ex Parte Levitt*, 302 U. S. 633, a private citizen claimed that Justice Black was ineligible for appointment to the Supreme Court under Article 1, § 6, cl. 2 of the Constitution. The Court ruled (p. 634):

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[5]

In *Schlesinger, supra*, the plaintiff Reservists Committee, similarly relying on the so-called Incompatibility

5. In the recent *Richardson* and *Schlesinger* cases, *supra*, the Court reaffirmed its ruling in *Levitt*.

Clause of the Constitution, asserted that members of Congress were barred from serving in the Armed Forces Reserve. Again the Court refused to reach the merits. *Cf. Morrison v. Callaway,* 369 F. Supp. 1160 (D. D. C. 1974) (citizen-taxpayer lacks standing to challenge Alexander Haig's serving simultaneously as Assistant to the President and military officer); *Nader v. Bork,* 366 F. Supp. 104 (D. D. C. 1973) (Ralph Nader has no standing to challenge dismissal of Special Prosecutor).

It is true that in *Glidden Co. v. Zdanok,* 370 U. S. 530, the Court reached the merits of a private litigant's claim that an allegedly non-Article III judge had sat on a case properly determinable only by an Article III court. It did so because the constitutional protection at stake—the assurance to the parties that their case would be decided by a judge who had life tenure and whose compensation would not be diminished—was "designed in part for the benefit of litigants" and was so basic as to be considered "jurisdictional" (p. 536). Even so, it observed (p. 535):

> [T]his Court has described it as well settled "that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *McDowell v. United States,* 159 U.S. 596, 602 . . . Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad v. Kelley,* 302 U.S. 312, a private litigant ordinarily may not. *Ball v. United States,* 140 U.S. 118, 128-29.[6]

6. Since the decision in *Glidden,* the courts of appeals have repeatedly refused to consider challenges by draft registrants to the composition of local draft boards. *Gee v. Smith,* 479 F. 2d 642 (5th Cir. 1973) (claim of racial discrimination in composition of draft board cannot be raised as defense to conviction of refusal to submit to induction); *United States v. Potter,* 467 F. 2d 1316 (6th Cir. 1972); *United States v. Chaudron,* 425 F. 2d 605 (8th Cir. 1970) (residential qualifications of members of Local Draft Board not subject to attack by way of defense to a refusal to report indictment); *Czepil v. Hershey,* 425 F. 2d 251 (7th Cir. 1970) (residential qualifications of board not subject to attack in a pre-induction suit for injunction; qualification of members must be raised by proceedings in nature of *quo warranto*). Yet, in all of these cases—in marked contrast to the situation posed by the instant case—the complainants were in a position to assert that the defect went to the qualifications of the board members to decide their cases fairly.

Appellants may suggest that they have standing because the Federal Election Campaign Act Amendments provide that "the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions . . . as may be appropriate to construe the constitutionality of any provision of this Act . . . 2 U. S. C. § 437h(a)." However, this provision should not be read to confer standing on persons who fail to show a substantial impact upon their conduct. This is confirmed by the relevant Conference Report which states that the special judicial review provisions of the Act "are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, *related to the activities regulated by the Act*" (emphasis added).[7] Moreover, the statutory language "as may be appropriate" hardly evinces a purpose to override unbroken judicial precedents and to invite private parties who suffer no conceivable injury to dispute a question involving only the allocation of authority between two coordinate branches of government.[8]

7. Conference Report on S. 3044, No. 93-1237, 93d Cong., 2d Sess.; p. 96.

8. We note parenthetically that our interpretation is not one which forecloses the possibility of judicial review, although it should be added that, even if that were the case, judicial resolution

We accordingly urge that this Court rule that appellants are without any injury or interest which would justify their litigating the validity of the method by which the Commissioners were appointed. In the portions of the brief that follow, we shall assume, solely for the purposes of argument, that the merits of Question 8 are open and set forth our reasons for believing that, in the present context, the sharing of the appointive power between Congress and the President in the case of the Election Commission is both constitutional and highly appropriate.

II.

Congress May Constitutionally Appoint Officers Whose Functions Are Dominantly or Substantially Related to the Performance of Congressional Responsibilities.

A. Literally read, Article II, § 2, cl. 2 makes no provision for the appointment of any officers by the Legislative Branch. So construed, the provision would indicate that the Senate is without authority to select its Secretary; that the House lacks power to designate a Clerk or Sergeant of Arms; and that both branches of Congress are acting unconstitutionally in picking their committee staffs,

8. (Cont'd.)
of all constitutional questions is not inherent in our governmental system. *United States v. Richardson*, 418 U. S. 166. The appropriate method for raising the issue of the validity of the provision under which the Commissioners serve is by way of an action in the nature of *quo warranto* brought by the Attorney General. *See, e.g., Springer v. Philippine Islands*, 277 U. S. 189; *Newman v. United States ex rel. Frizzell*, 238 U. S. 537; *Wallace v. Anderson*, 5 Wheat. 291; *Application of James*, 241 F. Supp. 858 (S. D. N. Y. 1965). Note that the plaintiff in *Newman* relied upon a provision of the D. C. Code authorizing suit by the Attorney General or an "interested person" against a person who unlawfully holds public office. The Court was clear that the reference to an "interested person" would permit suit only by an individual who laid claim to the office in question and was not to be read as authorizing suit by one who alleged only a general interest as citizen and taxpayer. 238 U. S. at 547.

investigators and administrative personnel.[9] As we point out below, history as well as common sense refutes any such proposition.

A reading of the records of the Constitutional Convention shows that the differences of opinion with respect to the power of appointment focused on the question of the degree to which Congress should control or participate in the selection of *executive* officers. Under the Articles of Confederation, Congress alone had the power to appoint "committees and civil officers as may be necessary for managing the general affairs of the United States . . ." (Article 9).[10] Some of the members of the Convention, highly conscious of the then prevailing practice, were of the view, expressed by Gouverneur Morris, that the legislature is a body "too numerous" to continue to exercise that authority.[11] James Wilson was of the opinion that "there can be no good Executive without a responsible appointment of officers to execute" but believed that the nomina-

9. Article I, § 2 does provide, "The House of Representatives shall chuse their speaker and other Officers." Similarly, Article I, § 3, after providing that the Vice President of the United States shall be President of the Senate, states, "The Senate shall chuse their other Officers. . ." Read in context, however, these provisions appear to contemplate official posts to be occupied by the Representatives and Senators themselves. The records of the convention are silent on the point. Accordingly, we do not rest on these provisions (although they could be more broadly construed) but, as developed *infra*, on the proposition that, at a minimum, Congress has power to appoint inferior officers and employees to the extent "necessary and proper for carrying into Execution" its express or inherent powers (Art. I, § 8, cl. 18).

10. It also appears that under the State Constitutions in force between 1776 and 1787 the power of appointment was largely exercised by the legislatures. Thorpe, "Federal and State Constitutions" (1929).

11. Farrand, "The Records of the Federal Convention of 1787" v. II, p. 389 (rev. ed. 1966). See, also, *id.*, p. 539, where Morris remarks, "As Congress now makes appointments, there is no responsibility," and suggests a division of functions between the President and the Senate.

tions should be made by a Council of Advice.[12] He further defined executive powers as "those of executing the laws, and appointing officers not appertaining to and appointed by the Legislature." [13] Mr. Sherman took the position that it was "proper that many officers in the Executive Department" should be appointed by the President but that "many ought not, as general officers of the Army in time of peace," because of the abiding danger that the Executive "may set up an absolute government." [14] In essence, there were two opposing pressures: one exerted by those who felt that the Congress should not be deeply implicated in the selection of executive officers because responsibility should be centered; the other exerted by those who feared that centralization of appointive authority could lead to despotism.

Article II, § 2, cl. 2, as it finally evolved, reflects a compromise. The President's power to appoint ambassadors, public ministers and consuls, and Judges of the Supreme Court is made subject to Senate confirmation. The President may appoint other officers only when the positions are "established by Law." [15] These appointments are also subject to Senate confirmation except that Congress has discretion to vest the sole power of appointment of "inferior Officers" in the President, the heads of departments or the courts of law. Congress, moreover, is free to establish the criteria for filling any vacancy.[16]

12. *Id.* pp. 538-9. Mason, Franklin and Dickinson also supported the idea of a Council. *Id.* p. 542.

13. Galliard Hunt and James Scott Brown, eds., "The Debates of the Federal Convention of 1787" (New York: Oxford University Press, 1920), p. 38.

14. Farrand, p. 405.

15. The express purpose of this language, added to the original text, was to "obviate doubts" that the President might appoint officers to positions not created by the Congress. *Ibid.*

16. In his dissenting opinion in *Myers v. United States*, 272 U. S. 52, Justice Brandeis collected some of the many statutes by

The important point for present purposes is that Congress was concerned to give the President ample power to select his own officers to execute the laws while retaining an effective degree of control—in the words of Gouverneur Morris, to give the President "responsibility" while retaining in the Congress sufficient control to provide "security." [17] There is not the slightest hint in the proceedings of the Convention that the Framers, who were of course highly sensitive to the dangers of executive authority and who debated at length the appropriate limitations to be imposed upon the President's appointive authority, had any thought to deprive the Congress, which was to exercise those controls, of the power to appoint its own inferior officers for purposes of executing such business as was appropriately related to Congressional functions. To do so would have relegated Congress, which contemporaneously exercised the appointive power exclusively, to a position below that of the co-equal branches (the Framers having also provided that the power to appoint inferior officers might be delegated to the courts of law [18]).

It can hardly be disputed, then, that Congress, at the least, has inherent power to appoint inferior officers or

16. (Cont'd.)
which Congress has traditionally "restrict[ed] the exercise by the President of the power of nomination" (p. 269). Included are a number of statutes that "confined the President's selection to a small number of persons to be named by others" (p. 274).

17. Farrand, p. 539.

18. In the Judiciary Act of 1789, § 7 (1 Stat. 73), Congress delegated to the Supreme Court and the district courts the authority to appoint their respective clerks. Ruling in *In Re Hennen*, 13 Pet. 230, that this carried with it the power to remove the clerk in the court's discretion, this Court observed that the power to appoint inferior officers, as spelled out in the Constitution, "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged" (13 Pet. at 258). As *Hennen* indicates and as the court below assumed, officers of the three departments are unquestionably officers of the United States.

employees for the discharge of its own responsibilities and the conduct of its own business. If it were necessary to look for explicit Constitutional authority to support the view that Congress may make appointments of that character, the grant of power embraced by the "necessary and proper" clause (Art. 1, § 8, cl. 18) would surely provide it. With these propositions, all members of the court below were in apparent agreement.[19]

B. Moreover, the practice prevailing from the earliest days of the Republic fully supports the conclusion that Congress does not lack appointive power. This is not to say that Congress may make the appointment to any office that it creates. We assume that the power is limited to the situation where the function performed by the appointee bears a significant relationship to Congressional responsibilities. Our positon, elaborated in the section of the brief that follows, is that Congress has a special and pervasive role in relation to the electoral process—a constitutional role which plainly involves the performance of quasi-judicial and quasi-executive tasks as well as the conventional legislative function. At this juncture, we point out that, quite apart from its role in the electoral process, Congress has from the beginning exercised an appointive power in a wide variety of situations (in some, with less obvious justification than is present in the instant case) and that the legitimacy of these actions has been unquestioned. The

19. Appellants erroneously state (Br. 194) that the court below ruled that the FEC commissioners are not officers of the United States. Rather, it held that the grant of power to the President to appoint civil officers of the United States is not to be read as preclusive of Congressional authority to appoint such officers to aid in the discharge of Congressional responsibilities—specifically, the responsibility (quoting from *Smiley v. Holm*, 285 U. S. 355, 366) to prevent "fraud and corrupt practices" in the federal electoral process. Congress' power to appoint officers or commissioners to perform dominantly legislative functions, it stated, "draws sufficient authority from the necessary and proper clause . . ." See J. S. 1572-3.

instances are so numerous that we confine ourselves to illustrative examples.

Virtually the first act of the House of Representatives was to appoint a Clerk of the House.[20]

In 1792, the Second Congress, a body largely influenced by men who were among the Framers, enacted a statute (1 Stat. 282) which authorized a commission consisting of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury and the Attorney General "to purchase the debt of the United States, at its market price, if not exceeding the par or true value thereof . . . ."

The same Congress passed a Succession Act (1 Stat. 240) providing that "in case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability shall be removed or a President shall be elected"—thus exercising the power of appointment by designating the occupant of an office.[21]

Also in 1792 the House of Representatives assumed authority to create and staff an investigating committee with power to "call for such persons, papers and records as may be necessary to assist their inquiries." [22]

20. See "Standing Rules, Joint Rules and Orders for Conducting Business in the House of Representatives" (G. P. O., 44th Cong. 1st Sess.), note accompanying para. 10.

21. *See also* the Succession Act of 1886, 24 Stat. 1.

22. 3 Annals of Congress 490-494. The investigation related to the recent disaster suffered by the army in the northwest.

Although the Constitution contains no express provision authorizing Congress to make investigations and exact testimony—much less to appoint investigators—a broad power to conduct investigations through legislators and their appointees had been frequently exercised by the British Parliament and the colonial

Congress has designated those who are to serve as members of various quasi-public associations or corporations, *e.g.*, the Washington National Monument Society (11 Stat. 386), the National Military and Naval Asylum (13 Stat. 509), the American Printing House for the Blind (20 Stat. 467), the American Historical Association (25 Stat. 640), the Carnegie Institution (33 Stat. 575) and the American National Red Cross (33 Stat. 599).

In various contexts, it has appointed individuals to serve in public employment or office, *e.g.*, Morse to oversee experiments with telegraph (5 Stat. 618); regents of the Smithsonian Institution appointed by Joint Resolution (a practice instituted in 1846, 9 Stat. 115, and continued thereafter); managers of the National Asylum appointed by Joint Resolution (a practice instituted in 1867, 15 Stat. 1, and continued thereafter); Green to supervise the Library of Congress, 29 Stat. 470; Colum to be Commissioner of the Lincoln Memorial, 37 Stat. 731; Goethals to investigate designated claims, 38 Stat. 388; the President to send a named person to Alaska to construct a territorial railroad, 38 Stat. 772. In innumerable instances Congress has directed the President to appoint a named person to a particular military rank. See *Wood v. United States,* 107 U. S. 414.

As noted above, as early as 1792 Congress appointed a commission which performed an administrative or quasi-executive task: the purchase of outstanding instruments of debt. There have been numerous similar instances in which quasi-executive or quasi-judicial duties, as well as rule-making or recommendatory functions, have been per-

22. (Cont'd.)
assemblies, and was assumed by Congress without apparent doubt or debate. *See generally,* Landis, "Constitutional Limitations on the Congressional Power of Investigation", 40 Harv. L. Rev. 153 (1926).

formed by a committee, commission or board whose membership has been designated in whole or in part by the Congress (in some instances designating them by name; in others, by their office). The following are illustrative: Territorial governor and judges to lay out a town (2 Stat. 398); the Attorney General and the Secretaries of War, Treasury and Navy to be commissioners of hospitals (2 Stat. 650); the head of Indian tribes in Wisconsin to adjust land claims (5 Stat. 349); designated local officials of the City of Detroit to adjust land claims (5 Stat. 541); designation of members of a board of commissioners to equalize salaries of United States officers (12 Stat. 283); designation of individuals to select a site for a post office (15 Stat. 250) or prison (15 Stat. 282); designation of a commission to negotiate with hostile Indians and make treaty stipulations subject to action of the Senate (15 Stat. 17); designation of members of the National Forest Reserve Commission authorized to locate lands for purchase and to fix prices to be offered by the Secretary of Agriculture therefor (36 Stat. 961); designation of the members of a committee to expend appropriated sum for use of Civil War veterans (38 Stat. 237); designation of a Vocational Educational Board with authority to determine the adequacy of State plans for utilizing federal funds (39 Stat. 929); designation of an aircraft board to establish policies and standards for purchase of aircraft and other equipment (40 Stat. 296); the Federal Power Commission to consist of the Secretaries of War, Interior and Agriculture (41 Stat. 1063); designation of members of the National Capital Park and Planning Committee (45 Stat. 420).

It is also notable that for many years Congress has followed the practice of sharing with the President the responsibility for appointing members to commissions en-

gaged in fact gathering, study, research and the preparation of plans and legislative recommendations. The instances are so numerous that we confine ourselves to some examples from the last decade: Select Commission on Western Hemisphere Immigration (79 Stat. 920); Commission on Political Activity of Government Personnel (80 Stat. 868); National Commission on Reform of Federal Criminal Laws (80 Stat. 1516); National Commission on Consumer Finance (82 Stat. 164); National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (82 Stat. 223); National Advisory Commission on Low Income Housing (82 Stat. 497); Commission on Bankruptcy Laws of the United States (84 Stat. 468); National Commission on Individual Rights (80 Stat. 960); Commission to Review National Policy Toward Gambling (84 Stat. 938); Commission on Marihuana and Drug Abuse (84 Stat. 1280); Commission on the Organization of the Government for the Conduct of Foreign Policy (86 Stat. 496).

III.

Congress' Fundamental Constitutional Role in the Conduct of the Federal Electoral Process Embraces, in Addition to Its Legislative Power, the Performance of Quasi-Judicial and Quasi-Executive Functions.

In this section of the brief, we note initially the various sources of Congress' constitutional powers in relation to the federal electoral process. We then indicate the breadth and character of its legislative authority—a matter presumably not in dispute but one which sheds light upon the extent of Congress' auxiliary powers to do what is "necessary and proper." We examine, next, the judicial duties with which it is charged. Finally, we examine the administrative or quasi-executive functions that are appropriate to carrying out the foregoing and how Congress has traditionally performed those functions through its own delegates, with particular emphasis upon the administration of antecedent corrupt practices and federal financing legislation.

A. In addition to the general legislative powers vested in it by the Constitution (Art. I, § 1), Congress has enumerated responsibilities bearing on the conduct of federal elections.

Article I, Section 4, cl. 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article I, Section 5, declares that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." It states further that each House may "punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." [23]

So far as Presidential elections are concerned, the Twelfth Amendment to the Constitution provides that the certificates of the votes of the electoral college shall be transmitted sealed to the seat of government, "directed to the President of the Senate," and that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." (Analogous provisions were orig-

23. This, of course, includes the power to expel for fraud in obtaining election or for corruption of the electoral process. See *Powell v. McCormack*, 395 U. S. 486, 558-559 (concurring opinion of Mr. Justice Douglas).

inally within Art. II, § 1, cl. 3.) It was in execution of this responsibility to judge the *bona fides* of returns that Congress devised the procedures (discussed *infra*) utilized in adjudicating the disputed Hayes-Tilden contest of 1876.[24]

Congress additionally has the authority to implement by legislation the provisions of the Fourteenth and Fifteenth Amendments (an authority not implicated in the present case) and the powers conferred by the "necessary and proper" clause.

B. Congress' power to regulate the times, places and manner of holding elections has been broadly interpreted and widely implemented. In Chief Justice Hughes' words, speaking for a unanimous Court in *Smiley v. Holm*, 285 U. S. 355, 366, "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns . . . ."[25]

24. For present purposes, we shall not elaborate upon the procedures prescribed by the Amendment if no candidate has a majority of the electoral votes and the choice is thrown into the House.

25. Throughout most of our history, Congress has left the actual conduct of federal elections in the hands of State officials, though subject to federal standards, requirements and sanctions. The principal exceptions were during the Reconstruction Era. Thus the Supplemental Reconstruction Act of March 23, 1867, 15 Stat. 3, provided that the commanding generals of the military districts embracing the former Confederate States should assume control of registration and elections in their areas. More broadly, Congress provided in 1870 and 1871 that, upon citizens' petition, the judges of the United States Circuit Courts should appoint supervisors to oversee registration and polling in connection with any election at which representatives or delegates to Congress are to be chosen. The relevant provisions are set forth in *Ex parte Siebold*, 100 U. S. 371, which upheld the exercise of this appointive

Subsequently, in *United States v. Classic*, 313 U. S. 299, 318, the Court ruled that Congress' power to safeguard the integrity of elections extends to primary elections where "the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice . . . ."

While it is true that Article II, § 1, commits the power of appointment of Presidential electors and the manner of their appointment to the States, there is no question of the power of Congress "to preserve the purity of presidential and vice presidential elections" as well as of Congressional elections. *Burroughs v. United States*, 290 U. S. 534, 544.[26] "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Id.* at 545.[27]

25. (Cont'd.)
power by members of the judiciary (see discussion *infra*). The 1870-71 legislation remained in effect for a total of eleven Congressional elections before its repeal in 1894. *See generally*, Burke, Federal Regulation of Congressional Elections in Northern Cities, 1871-1894, American Journal of Legal History, v. XIV, pp. 17-34.

Where State officials supervise elections at which national officers are also being chosen, the officials are of course "amenable to both" sovereigns for the performance of their duties (*Ex parte Siebold, supra*, at 389). Insofar as their actions touch upon the federal electoral process, they are seen as Congress' officers and subject to the sanctions it has provided. *In re Coy*, 127 U. S. 731, 752-3.

26. *Burroughs* involved an indictment under the Federal Corrupt Practices Act of 1925, discussed *infra*.

27. On Congressional power over Presidential elections, *see, also, Ex parte Yarborough*, 110 U. S. 651, 657-8, 666-7; *Oregon v. Mitchell*, 400 U. S. 112, 123-4 (opinion of Justice Black); and the

Finally, of course, it is part and parcel of the legislative power to secure such information and data as is necessary or useful in the performance of the legislative role—a point we discuss more fully *infra* in connection with the delegation to the Election Commission of information-gathering functions.

C. The performance of judicial duties by the Congress is necessitated in part by the direction that each House shall pass upon the elections, returns and qualifications of its own members as well as by the provision governing the expulsion of members. Thus, in *Reed v. County Commissioners*, 277 U. S. 376, in adverting to the power of a Senate Committee to take ballots and ballot boxes from State officials in order to investigate the "means used to influence the nomination of candidates for the Senate" (p. 386), the Court reasoned that the Senate, as "judge of the elections, returns and qualifications of its members" is "fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department" (p. 388). "By means of its own process or that of its committee . . . [it has] authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections" (*ibid.*). The Court noted further that "Congress has passed laws calculated to facilitate such investigations" (*ibid.*).

In a case arising at a later stage of the same Senatorial inquiry, the Court ruled that exercise of the Senate's powers as the judge of elections "necessarily involves the ascertainment of facts, the attendance of witnesses, the examination

27. (Cont'd.)
opinions of the three-judge district courts in *United States v. Manning*, 215 F. Supp. 272, 283-9 (W. D. La., 1963) and *United States v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 350-5 (E. D. La., 1965).

of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment . . . ." *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 613.[28] *See also In re Loney*, 134 U. S. 372; *In re Chapman*, 166 U. S. 661.

Congress' role in a contested Presidential election is vividly illustrated by the events of 1876, when conflicting electoral returns were received from a number of States. In lieu of determining the contest itself, Congress passed a statute creating an electoral commission to which it delegated its investigatory and adjudicatory functions (19 Stat. 227). The judgment of the Commission was to be binding unless overridden by both Houses.[29] The membership of the Commission was prescribed by the statute and was to consist of five Representatives appointed by the House, five Senators appointed by the Senate and the Associate Justices of the Supreme Court assigned to the First, Third, Eighth, and Ninth Circuits. The four Justices were then to appoint a fifth Associate Justice to complete the Commission of Fifteen.

D. As observed above, Congress has plenary legislative power to establish regulations governing the federal electoral process. It also has the responsibility to judge elections, returns and qualifications—a role which includes the authority to engage in such administration, fact-gathering and investigation as may be appropriate to the making

28. The House of Representatives has long had detailed rules, analogous to the Federal Rules of Civil Procedure, as to the procedures to be followed in cases of contested elections. The current rules are codified in 2 U. S. C. §§ 381-396. Earlier rules were codified in 2 U. S. C. § 201 *et seq.*

29. The practical effect was to make the Commission's determination final since one major party dominated the Senate and the other the House. *See generally*, Haworth, "The Hayes-Tilden Disputed Presidential Election of 1876" (Russell & Russell, 1966 ed.).

of its judgments. There is no reason, however, to confine these auxiliary powers to a situation in which the dispute has crystallized and a challenge has already been presented. Thus, the responsibility to pass on qualifications carries with it the authority to impose and administer *ongoing* requirements calling for the disclosure and production of such information as may be relevant to qualification. Such requirements are but prophylactic measures to assure compliance with the law and to minimize the areas and instances of dispute. The same is of course true of Congress' responsibility to deal with corruption or with fraud upon the electoral process.

It is true, to be sure, that the administration of ongoing requirements to report and disclose information that will reveal compliance or failure of compliance with the law may fairly be characterized as a quasi-executive function. The point, however, is that it is intimately related to Congress' ultimate responsibilities—responsibilities that go well beyond a purely legislative role.

That the nature of the business to be conducted may justify, if not require, some blending of the rule-making, adjudicatory and administrative functions is hardly a novel concept in a society which has long conducted much of its vital business through boards and commissions. *Cf. Humphrey's Executor v. United States,* 295 U. S. 602.[30]

30. Speaking of the Federal Trade Commission and holding that the President does not have "illimitable power of removal" over its members (p. 629), the *Humphrey's* Court stated (p. 628):

> Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, its acts as a legislative agency. Under § 7, which authorizies the commission to act as a master in chancery

Indeed, as early as Justice Story's day, it was observed that the concept of separation of powers is far from an absolute. "It is not meant to affirm that they [the three departments of government] must be kept wholly and entirely separate and distinct . . . . The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments. . . ." Story, "Commentaries on the Constitution," § 525.[31]

An examination of Corrupt Practices legislation antecedent to the 1974 legislation at issue in this case (to which we now turn) shows that Congress and its agents have long exercised functions of the very kind and description that have now been delegated to the Federal Election Commission.

E. In creating the Federal Election Commission, the Federal Election Campaign Act Amendments of 1974 delegate responsibilities to it in three main areas of congressional regulation of federal election campaigns: (1) The

30. (Cont'd.)

> under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

31. In *Springer v. Philippine Islands,* 277 U. S. 189, upon which appellants rely, the Court ruled (Justices Holmes and Brandeis dissenting) that the Philippine Legislature violated the executive powers exclusively conferred upon the Governor General when it passed legislation taking from him control of the appointment of directors of two government corporations (the Philippine National Bank and the Philippine Coal Company) and placing legislators on the two boards. As noted by the court below, however, the *Springer* holding was rested on the premises that the legislation was not "incidental to the powers conferred" upon the Legislature (p. 201), nor "in aid of the performance" of its functions (p. 202). Note, also, that the proceedings in *Springer* were in the nature of *quo warranto* and were brought by the Government to oust the challenged directors. See Point I, *supra.*

Commission is given broad supervisory authority over administration of the reporting and disclosure requirements for political contributions and expenditures in federal elections contained in the Federal Election Campaign Act of 1971, as amended, 2 U. S. C. §§ 431 *et seq.*; (2) The Commission also plays an important role in the administration of the provisions for public financing of Presidential primary and election campaigns contained in the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act, 26 U. S. C. §§ 9001 *et seq.*, 9031 *et seq.*; (3) The Commission has a limited role in the administration of the limitations on contributions and expenditures contained in Chapter 29 of the Criminal Code, 18 U. S. C. §§ 608 *et seq.*[32]

Appellants urge that the delegation of some or all of these functions to a body chosen in part by the leadership of the Houses of Congress violates the constitutional separation of powers. They suggest that only members of the Executive Branch of the Government, nominated and appointed pursuant to Article II, Section 2 of the Constitution, may exercise the functions which Congress has given to the Election Commission. In this portion of the brief we show that, quite to the contrary of appellants' argument, Congress has in the past assigned the functions now given to the Commission not to Executive Branch officers and agencies, but to officers and arms of the Legislative Branch.

32. In addition to these three main areas of responsibility, the Commission is directed to be a general clearinghouse for information relating to the administration of elections and is specifically empowered to contract for studies into the administration of elections and to publish such studies. 2 U. S. C. § 438(b). In view of the extensive and heretofore unchallenged practice, summarized *supra*, of congressional appointment of federal study commissions, we assume that no substantial constitutional question is presented with respect to this activity.

1. The earliest examples of congressional statutory regulation of the federal election process did not, for the most part, involve separate administrative or enforcement machinery. The Enforcement Act of 1870, 16 Stat. 144, the constitutionality of which was upheld in *Ex parte Siebold, supra,* 100 U. S. 371, made criminal certain designated election practices, including voting fraud and other interference with the free exercise of the franchise.[33] The Tillman Act of 1907, 34 Stat. 814, was the first modern exercise of congressional power to regulate contributions in election campaigns. Banks and corporations were prohibited from making any monetary political contributions in federal election campaigns. Criminal sanctions were utilized and no separate administrative or enforcement mechanism was established. The Tillman Act was broadened and incorporated into subsequent legislation. See 35 Stat. 1088 (1909), 57 Stat. 163 (1943) and the Taft-Hartley Act, 61 Stat. 136, 159 (contributions by organized labor), and the Corrupt Practices Act of 1925, *infra.*

2. When Congress in the Corrupt Practices Act of 1910, 36 Stat. 822, first attempted a comprehensive regulation of campaign contributions and expenditures in federal elections, it utilized a legislative officer—the Clerk of the House of Representatives—to administer the regulatory system. The duties of the House Clerk under the 1910 Act were similar to those duties of the present Election Commission relating to the reporting and disclosure requirements of 2 U. S. C. §§ 431 *et seq.* Under the 1910 Act, political committees were required to keep records of all contributions and expenditures and to file the records with the Clerk of the House after the election. The Clerk

33. As noted above (p. 22, note), the 1870 legislation did provide that in certain circumstances federal judges might appoint election supervisors. See, also, the discussion of *Ex parte Siebold, infra,* p. 68.

was to make the filings available to the public. Certain campaign contributors were also required to file reports with the Clerk. Criminal penalties were provided for improper filing.

One year after its initial passage, the 1910 Act was broadened to include primary elections in its coverage, to require the filing of records of contributions by candidates as well as by political committees, and to impose spending limitations on both House and Senate election campaigns. 37 Stat. 25 (1911). The date for filing required records of contributions and expenditures was advanced so as to require receipt before the relevant election, and a second legislative officer—the Secretary of the Senate—was brought into the process of administering the reporting and disclosure requirements. Aspects of the 1910 Act, as amended, were upheld over constitutional objections in *United States v. Classic*, 313 U. S. 299.

3. The Corrupt Practices Act of 1925, 43 Stat. 1070, elaborated the reporting and disclosure requirements of the 1910 Act, which it replaced, re-imposed expenditure limitations in House and Senate campaigns, and re-enacted the Tillman Act prohibitions on contributions by certain types of entities. Again, the Clerk of the House and the Secretary of the Senate administered the system of required filings of reports of contributions and expenditures. The number of required filing dates for political committees was increased to five pre-election filings as well as a post-election summary. Candidates were required to file records of contributions and expenditures with the appropriate legislative officer once before and once after each election, and certain contributors were also made subject to these filing and disclosure requirements. In *Nader v. Kleindienst*, 375 F. Supp. 1138 (D. D. C. 1973), *aff'd*, 497 F. 2d 676 (D. C. Cir. 1974), the court held that the 1925

Act imposed no affirmative *duty* on the Clerk of the House or the Secretary of the Senate to refer violations of the Act to the Attorney General for criminal prosecution, but the court assumed that the Clerk and Secretary had the power to make such referrals. See, also, *United States v. Foote*, 42 F. Supp. 717 (D. Del. 1942), upholding the constitutionality of the 1925 Act.

4. Federal financing of Presidential election campaigns was first provided for in the Presidential Election Campaign Fund Act of 1966, 80 Stat. 1957, which established a fund to receive the proceeds of a one-dollar federal income tax checkoff system. Disbursements were to be made from this fund to political parties by the Secretary of the Treasury. However, Congress vested significant administrative and enforcement powers with respect to the federal financing system—functions similar to those vested in the Election Commission under the 1974 Act—in non-Executive Branch officers. The Comptroller General was given the function (exercised by the Commission under the 1974 Act) of certifying to the Secretary of the Treasury what amounts were due to be paid from the fund and to whom. The Comptroller General was also explicitly given rule-making and investigatory powers in connection with his certification function. In addition, § 304 of the 1966 Act created the Presidential Election Campaign Fund Advisory Board to "counsel and assist" the Comptroller General in performance of these duties. Four members of this Board were to be appointed by the Comptroller General—two from each major party on the recommendation of that party. Three additional Board members were to be appointed by the four members recommended by the political parties. Implementation of public financing under the 1966 Act was delayed by Congress pending its adoption of legislative guidelines. 81

Stat. 57. Such guidelines were not enacted until passage of the Presidential Election Campaign Fund Act of 1971, *infra*, which replaced most of the 1966 Act.

5. The Presidential Election Campaign Fund Act of 1971, 85 Stat. 560, substituted for the 1966 Act a more comprehensive system for the public financing of Presidential election campaigns. As in the 1966 Act, the Comptroller General was responsible for certification of entitlement to payments.[34] He was to be assisted by an Advisory Board similar to the one created under the 1966 Act, except that the membership of this Board was expanded to include, in addition to nominees of the political parties and their nominees, the two major party leaders in each House of Congress (as *ex officio* members of the Board). The 1971 Campaign Fund Act required at least five pre-election reports to be filed with the Comptroller General; it gave the Comptroller General general investigatory and record keeping powers (§ 9009), as well as the specific duty to audit and examine campaign expenses (§ 9007); and it provided criminal penalties for violating reporting requirements or exceeding specified expenditure and contribution limitations (§ 9012). The Comptroller General was given broad rulemaking authority to implement the Act (§ 9009) and regulations were issued by him, see 11 C. F. R. 1.1 *et seq.* (1974). In addition, § 9010 of the 1971 Campaign Fund Act gave the Comptroller General the independent power to institute suit seeking injunctive relief to enforce the Act, the power to sue to recover overpayments, and the power to defend his actions on appeal. The Comptroller General's duties under the 1971 Campaign Fund Act were thus essentially similar to the Elec-

34. Payments were never made under the 1971 Campaign Fund Act because the Act was not made applicable to the 1972 Presidential election and it has since been superseded by the 1974 Act at issue in this case.

tion Commission's duties under the public financing provisions of the 1974 Act, and these duties were, indeed, expressly transferred to the Commission by the 1974 Act, § 404 of the Act, 88 Stat. 1292-93 (to be codified at 26 U. S. C. § 9001 *et seq.*).

6. A second 1971 statute, the Federal Election Campaign Act of 1971, 86 Stat. 3, dealt, not with public funding of Presidential campaigns, but with the subjects covered by earlier corrupt practices legislation. Superseding the Corrupt Practices Act of 1925, it added to prior corrupt practices legislation in three main ways: It established limits on broadcast media spending by candidates; it amended the Criminal Code (18 U. S. C. § 608) to provide for limitations on the amounts that candidates for federal office could spend from personal family resources; and it broadened the disclosure requirements for campaign-related contributions and expenditures. Primary responsibility for administration and enforcement of the 1971 Act was placed in three "supervisory" officers—the Clerk of the House of Representatives (for matters related to House campaigns), the Secretary of the Senate (for matters related to Senate campaigns) and the Comptroller-General (for matters related to Presidential elections). Duties of these supervisory officers included comprehensive supervision of the reporting and filing requirements; auditing and field investigations; general rulemaking authority in the realm of required reports; receiving and investigating complaints and recommending to the Attorney General in appropriate cases the institution of civil (§ 308(d)(1)) or criminal (§ 311) proceedings. In addition, the Comptroller General was given authority to make interpretative rules relating to the media spending limitations and was designated to act as a national clearinghouse for electoral information. The 1974 Act which is at issue in this case

explicitly transferred the duties of the supervisory officers under the 1971 Act to the Federal Election Commission, § 208(c) of the Act, 88 Stat. 1286 (to be codified at 2 U. S. C. 431 *et seq.*).

To summarize the foregoing history: In statutes prior to the 1974 FECA Amendments, Congress repeatedly delegated administrative and enforcement responsibilities in connection with reporting and disclosure requirements for election expenditures and contributions, in connection with public funding of Presidential election campaigns, and in connection with limitations on permissible election expenditures and contributions. Except for the authority to institute criminal prosecutions, which has always resided in members of the Executive Branch (and which continues so to reside under the 1974 Act), these delegations vested responsibilities, not in *executive* officers and agencies, but in *legislative* officers or agencies. Functions similar to those presently exercised by the Federal Election Commission have previously been performed by the Secretary of the Senate, the Clerk of the House of Representatives, advisory boards selected outside of the provisions of Article II, § 2 of the Constitution, and by the Comptroller General.

The Comptroller General and the General Accounting Office, we emphasize, are "a part of the legislative branch of the Government." Reorganization Act of 1949, § 7, 63 Stat. 205. Appointed for a fifteen year term (31 U. S. C. § 43), the Comptroller is "independent of the executive departments" (31 U. S. C. § 41) and may be removed only by joint resolution of Congress or by impeachment (31 U. S. C. § 43).[35] Congress may act through him as it would through its own committees. *United States v. Stewart,* 234 F. Supp. 94, 99 (D. D. C.), aff'd, 339 F. 2d 753 (D. C. Cir.

35. See, also, 31 U. S. C. 65(d) (noting that the Comptroller performs his auditing functions "as an agent of the Congress").

1964). *See also,* Schwartz and Jacoby, "Litigation With The Federal Government" (1970), p. 161; Mansfield, "The Comptroller General" (1939), pp. 247-8.

Throughout the lengthy history of close Congressional regulation of the financial aspects of federal election campaigns no one, it appears, has previously seen fit to challenge, as a violation of the Constitutional separation of powers, the delegation of administrative and non-criminal enforcement responsibilities in this area to legislative officers and agencies. A number of cases have considered constitutional attacks on aspects of the prior legislation, but in none is there a suggestion of any impropriety by virtue of the delegation of authority to legislative officials. See *Burroughs v. United States,* 290 U. S. 534 (upholding requirement of reporting contributions to the Clerk of the House); *Rumely v. United States,* 197 F. 2d 166, 187 (D. C. Cir. 1952), *aff'd,* 345 U. S. 41 ("no one would seriously contend that the requirements for disclosure under the [1925] Corrupt Practices Act are offensive to the Constitution"); *United States v. Harris,* 347 U .S. 612 (upholding the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261-270, under which the defendant was charged with failure to report lobbying expenditures to the Clerk of the House); *Pichler v. Jennings,* 347 F. Supp. 1061 (S. D. N. Y. 1972) (challenge to provisions of 1971 Federal Election Campaign Act requiring disclosure of contributors); *United States v. National Committee for Impeachment,* 469 F. 2d 1135 (2d Cir. 1972) (challenge to reporting requirements of 1971 Federal Election Campaign Act); *ACLU v. Jennings,* 366 F. Supp. 1041 (D. D. C. 1973), appeal dismissed as moot, 95 S. Ct. 2646 (1975) (same); *Nader v. Kleindienst,* 375 F. Supp. 1138 (D. D. C. 1973), *aff'd,* 497 F. 2d 676 (D. C. Cir. 1974) (power of House Clerk and Senate Secretary to refer violations of Corrupt Practices Act for prosecution); *United States v. Finance Committee to Re-*

Elect the President, 507 F. 2d 1194 (D. C. Cir. 1974) (affirming conviction for failure to report under 1971 Federal Election Campaign Act).

IV.

The Specific Functions Entrusted to the Federal Election Commission Are Duties Which Can Constitutionally Be Delegated to Officers Serving as an Arm of the Legislature and Appointed in Part by the Congress.

As noted above, the functions delegated by Congress to the Federal Election Commission are of three principal types: (1) supervision of the reporting and disclosure requirements relating to contributions and expenditures in federal elections; (2) duties in connection with federal financing of Presidential primaries and election campaigns; and (3) duties in connection with limits imposed on permissible contributions and expenditures in federal elections. We here describe these functions in some detail and show how, as to each type of function, the duties delegated are appropriately vested in a Commission serving as an arm of the legislature. After describing the duties of the Commission in the context of the Congressional scheme, we deal further, and more specifically, with various objections raised by appellants with respect to the delegation of particular powers to the agency.

If the FEC were an agency performing a dominantly executive role, we assume that its full membership would be required to be appointed under the provisions of Article II. The fundamental point of this aspect of the current litigation, however, is that the Commission serves not in a dominantly executive capacity, but as an immediate arm of the Congress. It performs functions which the Congress could perform itself or through its legislative committees or staff. These functions are directly related to and in aid

of continuing congressional responsibility over the federal electoral process. In these circumstances, Congress may, we submit, select the individuals who perform these delegated tasks, just as it may select committee chairmen, committee staff personnel, the House Clerk and the Senate Secretary. The Executive has no constitutional prerogatives in the selection of personnel, such as the members of the Federal Election Commission, whose primary task is to aid Congress in the performance of its responsibilities.

A. Duties in Connection With Reporting and Disclosure of Contributions and Expenditures.

One of the Commission's primary roles under the 1974 Act is to act as Congress' delegate in supervising the gathering of extensive information relating to the financing of federal election campaigns. Under the Act, the Commission is designated as the recipient, on behalf of Congress, of a variety of statements and reports relating to contributions and expenditures in federal election campaigns. (In the case of reports and statements required to be filed by candidates for the House and Senate, the filings are initially to be made with the Clerk of the House of Representatives and the Secretary of the Senate, respectively, but these officers receive such filings as "custodian" for the Commission. See 2 U. S. C. § 438(d).) The information thus required to be filed with the Commission includes statements of organization of political committees (2 U. S. C. § 433); reports of receipts and expenditures by political committees and candidates (§ 434); reports from certain contributors to political campaigns (§ 434(e); § 437(a)); and statements relating to the financing of, and expenditures in connection with, Presidential nominating conventions (§ 437).

The Commission's affirmative duties in connection with reports of election contributions and expenditures

are closely related to its function as the gatherer of election financing information sought by Congress. With regard to the reporting and filing process itself, the Commission is to develop and furnish the forms on which reports and statements are to be made (§ 438(a)(1); § 434); to make rules for the reporting of unusual items such as petty cash disbursements (§ 437b(b)) and debts and promises to contribute (§ 436(c)); to prepare a manual setting out uniform methods of bookkeeping and reporting to be used in the filing process (§ 438(a)(2)); to develop indexing systems for the filed material (§ 438(a)(3)(6)); to preserve reports and statements filed with it and to make them available to the public (§ 438(a)(4)(5)); and to designate the period of time for which persons must preserve copies of filed reports and statements (§ 436). In order to insure the integrity of the information-gathering system the Commission is required to perform audits and field investigations with respect to filed reports and possible failures to file required statements or reports (§ 438(a)(8)). It must also determine the periods of time during which receipted bills and accounts must be preserved (§ 432(d)); and it is to make rules for the establishment of campaign depositories by Presidential candidates (§ 437b(c)). To provide needed, although limited, flexibility in the reporting system, the Commission is empowered to waive certain filing dates and requirements (§§ 434(a)(3); 436(b)), and it may render advisory opinions with respect to the meaning of the filing requirements as applied to specific transactions or activities so as to protect persons who, in good faith, attempt to comply with those requirements (§ 437f).

In addition to its auditing functions, the Commission has a further role in seeking compliance with the information-gathering system that Congress has established. The Commission is to receive complaints of violations of the filing and reporting requirements and is either to investigate these itself (through hearings or otherwise) or refer apparent violations directly to the Attorney General (§ 437g). If the Commission investigates an alleged violation and determines that applicable reporting requirements have not been or are not being complied with, it may attempt to correct the default through conciliation (§ 437g(a)(5)). If these methods fail, the Commission may institute a civil action for injunctive or other relief to correct such violations (§ 437g(a)(5)). Alternatively, it may ask the Attorney General to institute such a civil action (§ 437g(a)(7)), and the Commission is further directed to refer apparent violations of criminal provisions to the appropriate law enforcement authorities (§ 437g(a)(6)). As an "additional enforcement authority" the 1974 Act provides that a Commission determination, after notice and hearing, that a candidate for federal office has failed to file a required report, has the effect of disqualifying the candidate for election to federal office for a limited period. As with all other Commission determinations of violation of the filing requirements, such a Commission finding is subject to judicial review (§ 456).

Although the Commission is given the general power to formulate rules for the proper effectuation of the reporting and disclosure requirements of the 1974 Act (§§ 438d; 437(a)(8)(9)), such rules cannot be finally promulgated by the Commission itself. In recognition of the Commission's role as the agent of Congress, proposed rules formulated by the Commission must be transmitted to the Congress and may take effect only if not disapproved by either House within thirty legislative days (§ 438). The Commission is also obliged to make annual reports to each House of Congress and to the President concerning its activities in carrying out its duties, together with recommendations for legislative or other action it deems appropriate.

As shown in Point E of the preceding section of this brief, there is direct historical precedent for vesting virtually all of the above-described duties relating to the information-gathering process in officers or arms of the Congress rather than in executive or quasi-executive officials chosen under the appointment provision of Article II, Section 2 of the Constitution. Thus, the Clerk of the House and the Secretary of the Senate have been the designated recipients and custodians of reports relating to election financing and expenditures since the Corrupt Practices Act of 1910. The power to refer violations of reporting requirements for prosecution was apparently assumed to rest in the Clerk and the Secretary, at least since the 1925 Corrupt Practices Act. See *Nader v. Kleindienst, supra.* Under the 1971 Federal Election Campaign Act the designated "supervisory officers" were the Clerk, the Secretary, and the Comptroller General. These legislative officers had, in addition to their functions under prior legislation, the power to make audits and field investigations, to receive and investigate complaints, to recommend the institution of civil or criminal proceedings, and to make rules relating to the required reports and filings. While the supervisory officers did not themselves have the power under the 1971 Campaign Act to institute civil actions to obtain compliance with the Act, such power was vested in the Comptroller General under the 1971 Presidential Election Campaign Fund Act, which also contained reporting requirements regarding expenditures and contributions.

Aside from the historical precedents, there is ample basis to conclude that Congress may appropriately vest information-gathering duties relating to the financing of federal elections in its own delegates. Such information is directly related to two constitutional functions of Congress—that of formulating legislation governing the federal election process and that of judging the elections and qualifications of its own members and of supervising the legitimacy of the returns in Presidential elections. Under Article I, Section 8 of the Constitution, Congress may enact "all Laws which shall be necessary and proper for carrying into Execution" these functions. The gathering of comprehensive and accurate information about election financing is quite obviously both relevant and necessary to the continuing legislative oversight which Congress, through repeated corrupt practices and campaign funding legislation, has exercised over the federal electoral process. The legislative process can hardly be properly informed without the availability of such information, and Congress plainly has the power to gather the required data, if necessary by compulsory process. *Sinclair v. United States,* 279 U. S. 263; *Hutcheson v. United States,* 369 U. S. 599. With regard to Congress' adjudicatory role over election returns and the qualifications of its members, the information gathered by the Election Commission serves both to deter fraudulent practices which would be a basis for disqualification and to provide a basis for disqualification itself (or for expulsion) when the filed information shows a violation of laws regulating financial campaign practices. As to the undoubted power of Congress to gather information—independently of the Executive—for its adjudicative purposes, see *Reed v. County Commissioners, supra,* 277 U. S. at 388, recognizing the Senate's authority, "by means of its own process or that of its committee . . . to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." See also *Barry v. United States ex rel. Cunningham, supra; In re Loney, supra; In re Chapman, supra.*

An additional practical consideration of great weight supports Congress' partial use of its own delegates, rather than exclusive reliance upon Presidential nominees, to

gather information relating to its legislative and adjudicative roles in the federal electoral process. As recent events have shown, the President, both as head of his party and as candidate for his own re-election, not only has a distinctly partisan interest in election financing matters, but may even be implicated, either personally or through his own campaign staff, in actual wrongdoing or in suppression of information about federal campaign financing practices. The 1974 Act was passed by Congress in the shadow of these events. To say that Congress, in these circumstances, must rely exclusively upon Presidential nominees to secure information about federal election financing which it requires to perform its constitutional responsibilities would impair, rather than vindicate, the constitutional principle of separation of powers. The Election Commission, a bipartisan body nominated in equal parts by the President and the leadership of the two Houses of Congress, appears a plainly appropriate response to the distinct danger that partisan political bias may affect the accuracy and completeness of the information which Congress requires in order to perform its constitutional duties.[36]

36. To hold, as we urge the Court, that Congress has properly delegated broad information-gathering functions to a Commission selected in part by itself and in part by the President, would not of course foreclose all future separation-of-powers challenges to all aspects of the Commission's information-gathering role under the 1974 Act. While it seems clear that at least the vast majority of the Commission's information-gathering duties are properly vested in an arm of the legislature, particular functions, as specifically applied in concrete situations, may conceivably be so dominantly executive or judicial in nature as to raise more substantial questions. Such a contention might, for example, be raised as to a future exercise of the power of the Commission, under 2 U. S. C. § 456, to make determinations (subject, however, to judicial review) of filing violations which have the effect of disqualifying candidates from seeking federal office for limited periods of time. A challenge to this Commission function is obviously not ripe at the present time. Should such a challenge to a discrete Commis-

B. Duties in Connection With Federal Financing of Presidential Elections and Primary Campaigns.

The Federal Election Commission is the principal administrator of the system for federal funding of Presidential election and primary campaigns contained in Chapters 95 and 96 of the Internal Revenue Code, 26 U. S. C. §§ 9001 *et seq.* and 9031 *et seq.* (the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act). In general, the Commission's duties under this legislation are (1) to certify that only those who comply with the statutory conditions for eligibility receive funds in the statutorily prescribed amounts, and (2) to see that overpayments or improperly spent funds are returned to the Treasury. This is precisely the kind of function that the Comptroller General, a legislative officer, normally performs where federal disbursements are involved. We submit that, just as with the Commission's information-gathering functions relating to the financing of federal election campaigns, the task of monitoring disbursements authorized by Congress is one which may constitutionally be delegated to a body some of whose members are appointed by Congress rather than by the President. This is especially so, we believe, because the disbursements here are to be used to finance *Presidential* election and primary campaigns. In view of an incumbent President's potentially partisan role in such campaigns (whether or not he is himself a candidate for re-election), Congress, we believe, did not act inappropriately in reserving to itself the power to select (on a bipartisan basis) a portion of the body charged with insuring that the federal funds are properly allocated and spent.

36. (Cont'd.)
sion power ever prove successful in a justicable context the result would, of course, be to delete the particular improper exercise of power from the Commission's duties, rather than to void the entire delegation of preponderantly valid functions. Note, in this connection, the explicit separability provision contained in 2 U. S. C. § 454.

A principal function of the FEC under the Presidential election financing provisions is the duty of certifying candidates as eligible for receipt of federal funds. In order for a Presidential candidate to be eligible to receive such funds, he must agree in writing to furnish the Commission with evidence of his campaign expenses, to keep and furnish records, to submit to Commission audit, and to make any required repayments where necessary. 26 U. S. C. § 9003(a). Presidential candidates seeking federal financing must also certify to the Commission that they will not incur campaign expenses in excess of the amount of federal funding received and that they will not accept private financing. The Commission is to designate the time when such certification must be made (§ 9003 (b)(c)). If candidates submit the required agreements and certifications, the Commission is, in turn, to certify their eligibility for payment to the Secretary of Treasury, who is charged with the actual disbursement of the authorized funds (§§ 9005, 9006(c)). The Commission has no role in determining the amounts paid to eligibile candidates, such amounts being fixed by statute (§ 9004).

The 1974 legislation also provides for federal financing of Presidential nominating conventions and of Presidential primary campaigns. The Commission's certification duties with respect to these payments are similar to its duties relating to Presidential campaigns (§§ 9008(g), 9033, 9036, 9037).

Once payments of federal funds are made pursuant to the above provisions, the Commission has the responsibility of auditing the expenses of Presidential candidates and others who receive these funds (§§ 9007(a), 9008(g), 9009(b), 9038(a), 9039(h)), and may, to this end, require the keeping of appropriate records (§§ 9009(b), 9039(b)). If the Commission determines that any Presidential candidate received or spent more than was allowable under the applicable statutes, it is required to notify the recipient, who is under a duty to repay the improperly received or expended amounts to the Secretary of the Treasury (§§ 9007(b), 9008(h), 9038(b)). If repayment is not made, the Commission may institute suit to recover the amounts due the Secretary (§§ 9010(b), 9008(h), 9040(b)) and it may generally seek injunctive relief to compel compliance with the pertinent statutory requirements (§§ 9011, 9040(c)). Criminal sanctions are imposed for violations of the federal financing statutes (§§ 9012, 9042), but the Commission has no direct role in respect to the enforcement of these penalties.

As is the case with the information-gathering provisions of Title 2, U. S. C. (discussed in Section A of this part of our brief), the Commission has general rulemaking authority regarding the federal financing provisions for Presidential elections and primaries. Just as in the information-gathering area, however, such rules may only be proposed by the Commission. They become effective if not disallowed by either House of Congress within thirty legislative days (§§ 9009(c), 9039(b)). The Commission may waive certain expenditure limitations relating to nominating conventions when it determines that, due to extraordinary and unforseen circumstances, additional expenditures are necessary to ensure an effective convention (§ 9008(d)),[37] and it may render advisory opinions so as to protect persons who, in good faith, seek to comply with the statutory requirements (2 U. S. C. § 437f). The Commission is to make reports to the Congress of the

37. This provision has been narrowly (and, we believe, correctly) interpreted by the court below to refer to situations of emergency (such as a strike or breakdown of equipment) that require unanticipated measures in order to keep the convention functioning. J. S. 1580. So interpreted, the provision authorizing the allowance of additional expenditures to meet situations falling within this limited category easily withstands appellants' void-for-vagueness claim.

expenses incurred by Presidential candidates and parties, amounts certified by it for payment, and amounts required to be repaid (§§ 9009(a), 9038(a)).

As the above description shows, the Commission's function with regard to the federal financing of Presidential campaigns under the 1974 legislation is a ministerial and watchdog role. It certifies when candidates and parties have met the statutory requirements for eligibility for funds, it audits the accounts of those who receive funds, and it is charged with attempting to obtain repayment of improperly received or improperly spent funds. The Commission has no power to set policy regarding the extent or allocation of federal financing, these matters being fully prescribed by statute. The Commission's role in this area is thus quite similar to that exercised by the Comptroller General with regard to federal appropriations generally. The Comptroller General audits substantially all government accounts (see 31 U. S. C. §§ 41, 44, 60, 67) and certifies amounts for payment (31 U. S. C. §§ 47, 71, 72, 74). The Commission's role in enforcing repayment of overpaid or misspent amounts has precedent in the Comptroller's power to set off claims by the Government against persons seeking to recover from the United States, and to bring suit to enforce such set-offs (31 U. S. C. § 227).[38] Indeed, in the area of federal funding of Presidential elections, under the legislation immediately preceding the 1974 Act (The Presidential Election Campaign Fund Act of 1971 (discussed in Point III-E of this brief, *supra*)), the Comptroller General, assisted by an Advisory Board chosen outside the appointment provisions of Article II of the Constitution, exercised all the principal functions—including the duty to sue to recover overpayments and to seek injunctive relief—now vested in the Commission by the 1974 Act.

38. Under 31 U. S. C. § 227, if a private plaintiff obtains a judgment against the United States, and the Comptroller General determines that the holder of the judgment is, in turn, indebted to the Government on another matter, the Comptroller is authorized to withhold an amount equal to the debt to the Government and to institute suit for judicial confirmation of the set-off. The Comptroller General has also been accorded the power, under Section 1016 of the Impoundment Control Act of 1974, 88 Stat. 297, "through attorneys of his own selection," to bring suit in certain circumstances to compel executive officers to release impounded funds previously appropriated by Congress.

The line between those administrative functions which are so dominantly executive or quasi-executive that they may only be exercised by officials selected according to the appointment provisions of Article II, Section 2 of the Constitution, and those functions so related to the legislative role that they may be performed by legislatively selected officers acting as legislative agents is, as discussed in Point II of this brief, *supra*, necessarily indistinct at the fringes of the respective authorities. The Commission's functions of certifying payments, auditing accounts and recovering overpayments or misspent amounts fall within an area which appears to relate as closely to legislative as to executive duties. As the numerous instances of legislative selection of officials detailed in Point II of this brief indicates, Congress has in the past, in several instances at least, picked officers of its own choosing to administer the expenditures of congressionally appropriated funds, and in some of these cases the officers so selected have possessed a discretion as to amount and recipient of funds which the Election Commission here totally lacks. When one considers, as well, that the Comptroller General—an arm of the legislature rather than of the executive—has long exercised certifying, auditing and set-off roles regarding federal expenditures, it appears firmly established that Congress, if it so chooses, generally has the constitutional prerogative of

designating the personnel to oversee the integrity of its appropriations.

In the present instance the considerations supporting congressional use of an auditing and certifying agency whose members are not entirely selected by the President are, moreover, of much greater strength than is the case with the supervision of federal appropriations generally. Once having determined to create a separate agency to monitor the federal financing of Presidential election campaigns (a decision surely within Congress' power to make) it would be a strange situation indeed, especially in light of recent events showing the potentialities for abuse of Presidential power, if Congress were required to vest in an incumbent President—himself a candidate for re-election and, as such, both a primary beneficiary of the federal funds and a political competitor with others entitled to claim such funds—the exclusive power to nominate the members of that agency. Congress, we believe, was entitled to take steps to insure both the apparent and actual fairness of the financing process.[39]

C. Duties in Connection With the Limits Imposed on Permissible Contributions and Expenditures in Federal Elections.

Sections 608-617 of the Criminal Code (18 U. S. C. §§ 608-617) contain comprehensive substantive limitations on the amounts and sources of contributions and expendi-

39. Just as in the area of information gathering about the financing of federal election campaigns, we do not urge here that all conceivable future exercises by the Commission of its statutory roles relating to the financing of Presidential campaigns will necessarily be consistent with separation-of-powers principles. Where the Commission is challenged at the outset as improperly appointed and, hence, unable to function at all, the relevant question is whether the general scope of Commission functions are properly delegated to a legislative agency. See footnote 36, p. 42, *supra*.

tures in federal election campaigns. These sections provide criminal penalties for their violation.

The Election Commission's role with regard to these substantive limits and their enforcement is a narrow one. It may receive and investigate complaints about violations and may refer apparent violations to the Department of Justice for prosecution or civil relief (2 U. S. C. § 437g (a)(b)(7)). The Commission, however, is given no independent enforcement authority with respect to these provisions. (See 2 U. S. C. § 437g(5), restricting the Commission's independent enforcement authority to violations of "this Act," i.e., the information-gathering provisions, as compared with 2 U. S. C. § 437g(7), which authorizes the Commission to refer to the Attorney General violations of both "this Act" and the Criminal Code provisions in 18 U. S. C. §§ 608-617).

The Commission may issue advisory opinions as to the meaning of §§ 608-617 (2 U. S. C. § 437f) and it may institute actions for declaratory judgment to test their constitutionality (2 U. S. C. § 437h).[40] The Commission is given no general substantive rulemaking authority with regard to the Title 18 spending and contribution limitations, although it is authorized to make such rules in one limited area, that of allocating primary campaign expenditures as between States when such expenditures are made for use in two or more States (§ 608(c)(4)).[41]

40. It is also the designated recipient of certifications from the Secretaries of Labor and Commerce regarding fluctuations in the price index and voting age populations of election districts (18 U. S. C. § 608(d)(g).). Such fluctuations affect the spending limits which Title 18 imposes, but the Commission's duties here are totally passive and ministerial.

41. Thus § 608(c)(1)(A) limits the total expenditures of candidates in Presidential primaries in any State to twice the expenditure limitation applicable to senatorial candidates in such State. Where a Presidential primary candidate makes expenditures which are used in more than one State, as where he sponsors a broadcast

If, as we argue above, the Commission has properly been delegated broad responsibilities in gathering information about election financing for use by Congress and in monitoring the disbursement of federal funds to be used to finance Presidential primaries and election campaigns, its narrow additional functions relating to the Criminal Code limitations on expenditures and contributions would appear to raise no substantial additional problems regarding the appropriate separation of powers. The Commission's limited functions with regard to the Criminal Code provisions are intimately and naturally related to its other responsibilities. Thus, the Commission's exercise of its auditing and investigating functions with respect to the required reporting of campaign contributions and expenditures and the uses made of federal financing funds might well reveal apparent violations of the Criminal Code contribution and expenditure limitations. Congress can hardly have overstepped constitutional bounds in permitting the Commission's investigations full sweep and in requiring the Commission to notify the appropriate law enforcement authorities of such violations, should they be discovered. Again, the intimate relationship between the required reporting of expenditures and contributions, on the one hand, and the substantive limits on the amount and source of such expenditures and contributions, on the other, make it appropriate for the Commission's advisory opinion responsibility to cover both subjects. This is especially so as

41. (Cont'd.)
or telecast which simultaneously reaches two States conducting Presidential primaries, the Commission is to prescribe rules allocating the single expenditure as between the two States, for purposes of determining whether the total amount spent in each State exceeds the statutory limits. The substance of the Commission's rule is not discretionary with it, but the rules are to be "based on the voting age population in [each] State which can reasonably be expected to be influenced by such expenditure." §608(c)(4).

a Commission advisory opinion merely creates a presumption of compliance on the part of one adhering to the Commission's views and operates neither to increase the substantive scope of the criminal provisions nor to intrude upon the prosecutor's prerogatives (2 U. S. C. § 437f(b)). Again, there would appear to be no threat whatsoever to the proper separation of powers in Congress' authorization of the Commission as a proper party to seek declaratory judgments respecting the constitutionality of regulatory legislation closely related to the Commission's primary responsibilities. Finally, the power to make rules allocating multi-state expenditures of federal funds in Presidential primary campaigns as between the States involved is extremely limited in scope and discretion [42] and is a natural outgrowth of the Commission's legislative responsibilities in monitoring the proper expenditure of these federal funds.

D. Appellants' Objections to the Commission's Powers Are in Large Part Premature and in No Event Well Founded.

At this point we focus on objections that appellants make to various functions and powers of the Commission.[43]

42. See p. 49, *supra*, note 41.

43. Despite the fact that Point VIII of appellants' brief is entitled "The Enforcement Provisions of the Challenged Legislation Violate the Constitution," appellants in fact appear to argue (Br. pp. 193-204) not only that some of the Commission's assigned roles are *ultra vires*, but that the *very existence* of the F. E. C. is unconstitutional by virtue of the fact that some of its members were not nominated by the President. Arguing that a legislative agency may only perform functions which the Legislative Branch itself "could perform directly" and that the F. E. C. has been delegated some functions which the Congress could not perform, they conclude that F. E. C. may constitutionally perform *no* functions whatsoever (Br. 199).

Even if appellants were correct in concluding (as they are not) that some significant part of the F. E. C.'s assigned tasks are

With the exceptions noted in the Statement, *supra*, the court below found those objections premature. It noted, for example, that although appellants challenged the Commission's rule-making authority, no rules had become effective. To be sure, some of the Commission's activities may be at a more advanced stage by the time this Court has occasion to act. Nonetheless, it remains true that the Court has no pleading before it that challenges a particular action taken by the Commission, much less a showing that a definitive action taken by the Commission has caused an

43. (Cont'd.)
duties which may not constitutionally be delegated to a legislative commission, they would be clearly wrong in saying that the result of such a partially improper delegation to the F. E. C. would be that the F. E. C. could perform none of its functions. The legislation at issue in this case contains an explicit severability clause. See 2 U. S. C. § 454. As we have noted earlier (footnote, p. 42), the remedy for a delegation of power which is partially invalid would be to delete the particular improper power or powers from the Commission's duties, not to void the entire delegation. See, *e.g., Champlin Rfg. Co. v. Commission*, 286 U. S. 210, 234, 235, noting that a severability clause "discloses an intention to make the Act divisible" and that "unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." The legislation challenged in this case assigns to the F. E. C. many important functions in connection with federal election campaigns which even appellants, despite the spectacular breadth of their attack, do not appear to challenge as beyond the prerogatives of a legislative commission. Among these are the duties of collecting, collating, preserving, and reporting to Congress comprehensive information about the financing of federal election campaigns, auditing campaign accounts, certifying eligibility for public campaign finance funds, overseeing the repayment of overpayments or improperly spent funds, and transmitting recommendations for proposed legislation or other appropriate action. Moreover, as noted above, Congress had, under prior legislation, assigned most or all of these tasks to legislative officers such as the Secretary of the Senate, the Clerk of the House, the Comptroller General, and certain advisory boards. These are duties which Congress plainly wants performed and which unquestionably may properly be performed by legislative offices and agencies.

injury to a person before the Court. As a result, appellants' objections to the Commission's powers are entirely abstract.

Appellants' reasoning on the merits is that the members of the F. E. C., not having been appointed exclusively by the President, cannot perform any quasi-executive or quasi-judicial functions. Our basic response is rooted in the contentions already elaborated: that Congress' responsibility in relation to federal elections goes well beyond the mere legislative prohibition of fraud or corruptive practice (its role encompassing a duty to secure, examine and audit relevant information, both in order to judge elections and qualifications and in order to deter the exertion of corruptive influence; a duty to control and oversee the expenditure of public monies made available to those engaged in the electoral process; and a duty to initiate appropriate measures with respect to violations of law that come to its attention); that, although the functions entailed by this pervasive responsibility have quasi-executive and quasi-judicial aspects, they are functions appropriate to the Legislative Department in light of its constitutional role; and that accordingly they may appropriately be performed by a legislative commission in aid of the Legislature. It is against this background that appellants' arguments must be viewed.[44]

44. Appellants suggest that the Commission is "wholly subordinate" (Br. 210) to Congress and therefore should not be permitted to exercise responsibilities in a sensitive area. In fact, Congress has provided that the Commission is to be bipartisan, that its members shall be chosen on the basis of "maturity, experience, integrity, impartiality and good judgment" from among individuals not contemporaneously serving in the Government, that they shall have tenure for a period of six years, and that they shall have the authority to staff the agency. § 437c. If subordination were thought to result from the fact that four of the commissioners are appointed by action of the Congressional Parties, it would appear that a considerably greater degree of subordination

(1) *Rulemaking, Policy Statements, and Advisory Opinions.*

Appellants argue (Br. 206) that the publication of rules falls "quintessentially . . . within the executive sphere." Addressing the matter in the abstract, one might say with far greater conviction that rule-making is "quintessentially" a legislative function. In Professor K. C. Davis' words, it is "the part of the administrative process that resembles a legislature's enactment of a statute." Davis, "Administrative Law Text" (3d ed. 1972), § 5.01. The matter, however, is not one to be determined by affixing labels. The fact is that all three departments of government make rules, whether formally or informally. The real question is whether we are correct in our basic argument that Congress' constitutionally permissible role in relation to the federal electoral process is considerably broader than the bare legislation of statutory prescriptions. Thus, if, as we urge, Congress could administer a system of reporting and disclosure through its own officers (as it did for many years), it can certainly do so through a commission. The same holds true of auditing, supervising federal appropriations to candidates and other aspects of the statutory scheme. Moreover, whether Congress proceeds through subordinate officers or by the creation of a commission, it can surely instruct its delegate to fill in the details through rule-making. Indeed, it may be categorically stated that a failure by its delegate to provide guidance and regularization by rules (whether formal or informal) could only be productive of confusion, lack of uniformity and inequity. To quote again from Profes-

44. (Cont'd.)
would result if the appointive power were vested in a single official affiliated with a single Party. The short of the matter is that the device of the commission was adopted in order to achieve even-handedness and greater effectiveness.

sor Davis, rulemaking does not expand power but is "an especially important means of confining discretionary power." Id., § 604(a). Not surprisingly, a principal criticism of public officers and commissions has been a failure to provide the affected members of the public with adequate guidance and clarification. It is ironic that appellants should complain of this Congressional directive.[45]

We have noted that the legislation does not contain a grant of authority to promulgate rules governing Title 18 spending and contribution limitations.[46] It is of course true that there is inevitably some interplay between Title 2 and Title 18. If, for example, the Commission, for purposes of the Title 2 provisions relating to the reporting of expenditures, adopts a rule defining a certain item as an expenditure, that definition, if accepted by the Attorney General and the courts for purposes of a criminal proceeding under Title 18, would bear on the question whether, in a particular case, a candidate had exceeded the statutory spending limits. This is not because the Commission's definition of what is to be reported is binding on

45. This is not to deny that a rule adopted by the Commission would be vulnerable to attack if arbitrary, inconsistent with statutory terms or standards, or otherwise beyond the agency's authority. Any such claim, however, must obviously await a concrete case or controversy.

46. The notice of proposed rulemaking cited by appellants (Br. 203, note) is consistent with the above statement. That notice asked for comment as follows (40 Fed. Reg. 28333):

> "A. Comments should be directed to whether or not the Commission has the authority to issue regulations generally for 18 U. S. C. 608, 610, 611, 613, 614, 615, 616 and 617, similar to its authority with respect to Title 2, or whether the Commission can only issue regulations in respect to Title 18 so far as there is a question of:
>
> 1. General policy;
>
> 2. Where such regulations are necessary or appropriate in connection with the reporting requirements under Title 2; or
>
> 3. Where there are parallel references in Titles 2 and 18."

the Attorney General or the courts for purposes of deciding whether the substantive provisions of the Act have been violated. The case, rather, would be akin to any situation in which enforcement authorities give a measure of deference to an administrative interpretation that is not binding on them. In *Skidmore v. Swift & Co.*, 323 U. S. 134, 140, the Court, commenting on an interpretation of the Fair Labor Standards Act promulgated by the Administrator, observed:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The same, the Court notes (*ibid.*), is true of administrative interpretations by "other bodies."

It is of course commonplace that a statutory interpretation adopted by an independent regulatory agency will have relevance to a legal question arising in a criminal proceeding brought by the Attorney General to enforce the same statute.[47] That has never been thought to interfere with the prerogatives of the Attorney General, even though it is obviously true of other commissions, as it is of the F. E. C., that their members are not subject to

47. See, *e.g.*, the provisions of the Securities Act of 1933, 15 U. S. C. 77t, and the Securities Exchange Act of 1934, 15 U. S. C. 78ff.

executive control, either by way of day-to-day direction or by removal.[48]

Having firs contended that rule-making authority gives the Commission excessive authority, appellants next object (Br. 208) that "rules relating to reporting and disclosure requirements promulgated by the F. E. C. are subject to veto by one or both houses of Congress" pursuant to § 438(c), a provision plainly designed to keep the Commission from straying from Congress' purposes. This provision is questioned on the ground that the "legislative veto" does not involve Presidential participation. But a disapproval does not involve new legislation; it leaves the law unchanged. The procedure in question has the implicit approval of this Court. In 1934, Congress delegated to this Court the formulation and prescription of civil rules for the district courts. In a subsequent litigation raising the question whether certain rules that had been adopted and become effective were beyond the scope of the delegation, the Court, sustaining the rules in question, stated (*Sibbach v. Wilson & Co.*, 312 U. S. 1, 14-15): "Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature."[49]

48. It is also plain that where Congress has provided for a private right of action and for public enforcement of the same statute by the Attorney General (as, for example, in the Sherman Act), a private suit may establish precedent. It could hardly be contended, however, that the duality of the statutory scheme enacted by Congress deprives the Attorney General of constitutional prerogatives.

49. Appellants also suggest that a statute may not delegate to the Legislature (or one of its Houses) the power to disapprove a rule. As Professor Bernard Schwartz has pointed out (Schwartz, "Legislative Control of Administrative Rules and Regulations," 30 N. Y. U. L. Rev. 1032, 1043 (1955)):

> "Logically, to apply the separation of powers in this field is to take us back to the days when the maxim against dele-

What has been said of rulemaking obviously applies to the Commission's authority to formulate general policy. 2 U. S. C. § 437d(a)(9). The making of general policy is surely no less a legislative function than it is an executive or judicial one. Moreover, a statement of policy, though it may commend itself as one entitled to deference, is not controlling on the Attorney General or the courts. See *Skidmore v. Swift & Co., supra; United States v. Staph,* 375 U. S. 118, 128, n. 11.

The advisory opinion, like an interpretive rule or a statement of policy, expresses the agency's understanding of the statute's applicability to an activity or transaction. Though not binding, it provides guidance. Recognizing that secret rulings might in some circumstances become an instrument for favoritism rather than uniformity, Congress has provided that requests for advisory opinions shall be published and interested parties afforded opportunity to submit written comments. § 437f. We submit that the procedure is both salutary and consistent with Congress' role in the electoral process. In the court of appeals' words (J. S. 1579):

> . . . labelling particular functions as "executive" or "judicial" is the beginning rather than the end of the inquiry into whether the function is an appropriate one for a legislative agency. We discern no general constitutional barrier that would prevent a legislative agency from informing the public as to its interpretation of the statutory provision it must administer. In general, indeed, disclosure to the public of how a statute pertaining to election campaigns will be administered is viewed as wholesome, and in any event naturally related to the function of administration. The fact that advisory opinions are usually issued in connection with executive functions, or quasi-judicial functions, does not assign this technique exclusively to the executive or judicial branch.

49. (Cont'd.)
gation of powers was inexorably applied (in theory at least) in our administrative law. There is no more reason today to invalidate delegation of the annulment power to the legislature because of the separation of powers than there is to invalidate delegations of the rule-making power to the agencies themselves on similar grounds."

The court below also responded to the concern expressed in Judge MacKinnon's dissent, namely, that the "good faith" provision (i.e., that one who acts in good faith in accordance with an advisory opinion shall be presumed to be in compliance with the law) may clash with the Attorney General's prerogatives. Acknowledging that the language of presumption is "rather ambiguous," the majority pointed out that the relevant legislative history makes plain that the presumption is rebuttable and does not constitute a grant of immunity. *Ibid.* Thus, the agency is not in the position of administering provisions of the criminal law. At the same time, the provision for rendition of advisory opinions does serve as a measure of protection for the citizen who seeks assurance that his proposed conduct conforms to the law's requirements—a protection that derives not merely from the statutory words of presumption, but from the natural inference that one who acts consistently with official advice lacks criminal intent. It is difficult to see how appellants can claim that they are prejudiced by a procedural device that makes such guidance available.[50]

50. For this reason we have some doubt that the court below was correct in treating as ripe the question of the Commission's power to issue an advisory opinion. An entirely different question would be presented if any party before the Court were seeking declaratory relief with respect to a specific and adverse agency

(2) *Enforcement and Investigation.*

Appellants also challenge the F. E. C.'s enforcement powers under the 1974 legislation, urging that the power of enforcement is "executive beyond question" and, hence, inappropriate for a legislative agency. In fact, the enforcement powers delegated to the F. E. C. are quite limited in scope and, as limited, are well within the proper prerogatives of an arm of the legislature. In addition, as the court of appeals held and as the Attorney General in his *amicus* brief correctly urges, any challenge to the F. E. C.'s enforcement powers at this time is wholly premature and unripe.

In considering the F. E. C.'s enforcement powers it is well to focus, as appellants do not, on the actual scope of those powers as defined by the 1974 legislation at issue in this case. The 1974 statute, entitled the "Federal Election Campaign Act Amendments of 1974," is divided into three main parts. See 88 Stat. 1263-1304. Part 1 consists of amendments to §§ 608 *et seq.* of the Criminal Code (Title 18, U. S. C.) (see 88 Stat. 1263-1272). These amendments place substantive limits on contributions and expenditures in federal election campaigns. Part 2 of the 1974 Act consists of amendments to the Federal Election Campaign Act of 1971, 2 U. S. C. § 431 *et seq.* (see 88 Stat. 1272-1290). These amendments create the F. E. C., describe its duties, and impose reporting and disclosure requirements on political committees, candidates, contributors, etc. Part 3, the Presidential Election Campaign Fund Act and the

50. (Cont'd.)
interpretation on the ground that it was causing a present hardship. *See National Automatic Laundry & Cleaning Council v. Shultz*, 443 F. 2d 689 (D. C. Cir. 1971), holding that in the circumstances presented an interpretive ruling of the Administrator of the Wage and Hour Division, Department of Labor, was reviewable in advance of the institution of enforcement proceedings.

Presidential Primary Matching Payment Account Act, consists of amendments to the Internal Revenue Code, 26 U. S. C. §§ 9001 *et seq.* (see 88 Stat. 1291-1304). These amendments provide for federal funding of general and primary Presidential election campaigns.

The F. E. C.'s main enforcement powers with relation to the provisions of Titles 2 and 18 of the United States Code are set out in 2 U. S. C. § 437g, a provision of Part 2 of the 1974 legislation—*i.e.*, that part which consists of amendments to the Federal Election Campaign Act of 1971. The language of Section 437g imposes a critical limitation with respect to the F. E. C.'s enforcement powers. Where § 437g refers to enforcement of "this Act" —that is, where it refers to enforcement of the *reporting and disclosure* requirements contained in the amendments to the 1971 Act (2 U. S. C. §§ 431 *et seq.*)—it gives the F. E. C. full independent power to go to Court to obtain compliance with those information-gathering requirements. See subsection (5) of § 437g, giving the F. E. C. power to seek civil judicial enforcement as against acts "which constitute or will constitute a violation of *this Act*" (emphasis added). That "this Act" means, not the entire group of 1974 amendments, but only those amendments relating to the information gathering provisions of the 1971 Federal Election Campaign Act, is confirmed by footnote 1 to 2 U. S. C. § 434, as set forth in the statutory pamphlet entitled Federal Election Campaign Laws which has been lodged with the Court: " 'This Act' refers to the Federal Election Campaign Act of 1971 . . . as amended by . . . the Federal Election Campaign Act Amendments of 1974. This will be true whenever the term 'this Act' appears." But where § 437g refers to civil enforcement of the Criminal Code provisions of Title 18—provisions which set substantive limits on contributions and expenditures—it does not give the F. E. C. independent enforcement power, but

provides instead that the F. E. C. may only refer apparent violations to the Attorney General with a "request" that civil enforcement proceedings be instituted. See subsection (7) of § 437g, providing that "whenever in the judgment of the Commission . . . any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act or of sections 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 . . . upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief. . . ." [51] And the F. E. C., of course, has no enforcement power whatsoever with regard to the prosecution of criminal violations of the Title 18 provisions.

The short of the matter is that the F. E. C.'s independent judicial enforcement powers under § 437g relate only to the process of information-gathering on behalf of the Congress. They do not relate to the enforcement of the substantive limits on contributions and expenditures contained in the Criminal Code.[52] We submit that it is

51. It is true that 2 U. S. C. § 437c(b) gives the F. E. C. "primary jurisdiction with respect to the civil enforcement" of both "this Act" and §§ 608 *et seq.* of the Criminal Code. However, in view of the explicit language of §§ 437g(5) and (7), quoted in the text, the "primary jurisdiction" conferred by § 437c(b) evidently refers to the F. E. C.'s primary responsibility to receive complaints about, and to investigate, alleged violations of both parts of the 1974 legislation.

52. Even in the area of information-gathering, the Commission does not have *exclusive* enforcement powers. Under § 437g (7) the Commission may, if it wishes, refer all civil enforcement proceedings—including actions to compel compliance with the reporting requirements of the 1974 legislation—to the Attorney General. Section 437g(7) provides that, upon request by the F. E. C., the Attorney General, on behalf of the United States, "shall" institute a civil enforcement proceeding. We agree with the court below that "there is no showing in this case of a convincing legislative history that would enable us to conclude that 'shall' was intended to be the 'language of command.'" To our knowledge Congress has never attempted to deprive the Attorney General of his ordinary discretion to decline to institute legal proceedings.

entirely clear that Congress may thus vest in a legislative agency staffed by personnel of its own choosing the power to gather information on behalf of Congress relevant to Congress' own responsibilities—here the responsibility of exercising legislative oversight into the federal election process as well as the responsibility of judging the qualifications of its own members in terms of their compliance with federal election finance laws. As the court below noted (J. S. 1575): "It is certainly within the sphere of appropriate legislative activity for Congress to gather and audit information to aid in the process of 'preventing fraud and corruption' in federal elections and in formulating legislation to accomplish that goal" (citing *Barenblatt v. United States*, 360 U. S. 109, 111 (1959) ("[t]he scope of the power of inquiry is . . . as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution) and *McGrain v. Dougherty*, 273 U. S. 135, 175 (1927) ("[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change")).

And where Congress has the power to gather information, it also has the power, through its own agents, to invoke compulsive sanctions against persons who do not comply with its legitimate reporting and disclosure requirements. "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Dougherty*, 273 U. S. at 174. Congress may, indeed, apply coercive sanctions directly, without resort to the Judicial Branch. See, *e.g.*, *In re Chapman*, 166 U. S. 661; *United States v. Bryan*, 339 U. S. 323; *Watkins v. United States*, 354 U. S. 178, 206-207; *McGrain v. Dougherty, supra*. *A fortiori*, it may authorize its agents to use the judicial process to compel compliance with its proper requests for information. See,

e.g., Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813; *Senate Select Committee v. Nixon*, 498 F. 2d 725 (D. C. Cir. 1974). We note in passing that the independent administrative agencies also routinely exercise the independent enforcement power of going to court in aid of their information-gathering processes (see, *e.g.*, 15 U. S. C. § 49 (F. T. C.); 15 U. S. C. § 78 (S. E. C.); 29 U. S. C. § 161 (N. L. R. B.)), and that the same power has been given to legislative study commissions whose membership, like that of the F. E. C., is appointed in part by Congress outside of the provisions of Article II, Section 2 (see, *e.g.*, 84 Stat. 938, § 806 (Commission to Review National Policy Toward Gambling); 80 Stat. 868 (Commission on Political Activity of Government Personnel)).

It is not clear from appellants' brief which aspects of the F. E. C.'s enforcement authority they mean to challenge beyond those conferred by §§ 437g(5) and (7). The power to receive complaints and to investigate alleged violations of the reporting and disclosure requirements of Title 2 ("this Act") is a necessary part of the power to enforce compliance with those requirements. Since violations of the duties to report contributions and expenditures will often be linked with violations of the substantive limits on those contributions and expenditures, it was completely natural, we believe, for Congress to broaden the F. E. C.'s investigative authority to cover these substantive violations as well, subject to the proviso, as noted above, that if the F. E. C. should uncover an apparent substantive violation it may not commence enforcement proceedings itself, but must refer the case to the Department of Justice. Separation of powers principles are surely not violated by requiring legislative agencies to refer cases to the Executive when their investigations uncover violations of law.

As noted in Point IV-B of this brief, *supra*, the F. E. C. also has independent enforcement power, under the Internal Revenue Code provisions of the 1974 legislation, to insure that presidential candidates and others receiving federal funds in connection with presidential primaries, nominating conventions and general elections do not receive or spend more than is allowable under the law. These enforcement duties were exercised by the Comptroller General—a conceded legislative officer—under the legislation immediately preceding the 1974 amendments. In view of the traditional role of the Comptroller General in the area of appropriations, there can hardly be any serious doubt of the legislature's power to use its own officers to monitor the use of funds which it appropriates.

Finally (and without modifying, in any respect, our view that the enforcement powers delegated to the F. E. C. are entirely appropriate powers to be vested in a legislative agency) we wish to emphasize our agreement with both the court below and the Attorney General as *amicus* in this Court that appellants' challenges to the F. E. C.'s limited enforcement responsibilities are entirely premature. Questions of ripeness in constitutional adjudication are often close and intricate. This ripeness question is not. It is, quite frankly, difficult to conceive of any basis for the view that resolving the legitimacy of the F. E. C.'s enforcement responsibilities at this time will affect the conduct of any interested party in any respect whatsoever. The F. E. C. has begun no enforcement proceedings against anyone.[53] Indeed, since the F. E. C. is given the

53. Appellants suggest (Br. 203) that a letter sent by the Chairman of the F. E. C. to the Committee for a Constitutional Presidency—McCarthy '76 on August 28, 1975, constitutes a "threat" of "enforcement action." This letter plainly evinces the F. E. C.'s intention to audit the Committee's records, but we do not understand appellants to challenge the F. E. C.'s auditing responsibilities. The F. E. C. Chairman's statement that the

option in all cases of referring enforcement suits to the Department of Justice, the F. E. C. may *never* exercise the challenged powers at all. The questions urged by appellants may thus not only be unripe, but may be wholly academic as well. Moreover, all of the violations as to which the F. E. C. has any potential enforcement role are subject, whatever the speculative possibility of an F. E. C. enforcement proceeding, to criminal sanctions as well as to civil enforcement proceedings instituted by the Attorney General (see 2 U. S. C. § 441). It therefore cannot be credibly asserted that the F. E. C.'s enforcement power bears in the least upon the present conduct of the appellants.[54]

V.

The Method of Appointment Chosen by Congress Is Neither Incongruous Nor Violative of the Doctrine of Separation of Powers.

We have elaborated our reasons for believing that Congress may exercise authority to appoint officers when the functions delegated to those officers are substantially

53. (Cont'd.)
F. E. C. has been assigned "civil jurisdiction" hardly constitutes a "threat" that the F. E. C. will institute civil enforcement proceedings against the Committee. Such a threat could only occur after violations had been uncovered.

54. The same conclusion of prematurity applies with particular force to appellants' attack upon the candidacy disqualification provision in 2 U. S. C. § 456 (Br. 221-223). Obviously, no plaintiff has been subjected to a § 456 proceeding and it may be that § 456 will, in fact, never be invoked. If § 456 were invoked by the F. E. C. at some future date, the proceeding would be followed by full judicial review providing the disqualified candidate full opportunity to raise any constitutional claims. Finally, since § 456 applies only to statutory reporting violations, which all carry criminal sanctions, § 456 can have no possible present chilling effect upon the conduct of any appellant.

related to the performance of Congressional responsibilities; that Congress' constitutional role in the federal electoral process entails the performance of quasi-judicial and quasi-executive functions as well as exercise of its legislative power; and that when, as here, Congress delegates to a Commission functions of a kind that it is authorized to perform for itself, it may assuredly choose (or participate in the choice of) its surrogates.

So understood, the argument involves no clash with the concept of separation of powers.[55] Since the Commission is to perform tasks of a kind and character that Congress could appropriately perform (and has long performed) through its own staff and officers, it is in no sense an executive agency.[56] By the same token, there is no invasion of any prerogative reserved to the Executive Branch. As stated in *Humphrey's Executor v. United States*, 295 U. S. 602, 628, with reference to the Federal Trade Commission, "To the extent that [the Commission] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers . . . ."

As *Humphrey's Executor* further emphasizes, the doctrine of separation of powers is not an inflexible one rigidly dividing our government into three watertight compart-

55. We note parenthetically that the concept gained adherence at the Constitutional Convention because of apprehension that the Chief Executive might become excessively powerful. The concern was to limit "executive prerogatives customary in monarchies . . .," *Myers v. United States*, 272 U. S. 52, 293-4 (dissenting opinion of Justice Brandeis).

56. The Civil Service Commission issued an unpublished ruling on May 6, 1975 to the effect that the Election Commission is not within the Executive Branch and that its employees are accordingly not subject to Civil Service Commission regulations or the Hatch Act.

ments.[57] Rather, it reflects the precept that, as a general rule, each branch of government should have, and be free to exercise, those powers that are appropriate to its functions.

The point was strikingly made, almost a century ago, in *Ex parte Siebold*, 100 U. S. 376, a case which, like the instant litigation, involved control over the federal electoral process. Congress had provided in the Enforcement Act of 1870 that in certain circumstances federal judges should appoint supervisors to oversee elections being conducted in the States. The supervisors were to attend at places of registration and at elections, and were accorded authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and the election tally sheets. Addressing the claim that it was constitutionally impermissible for judges to be charged with the duty of appointing officials who would perform functions of a quasi-executive character, the Court ruled that the separation doctrine is not an "absolute" (100 U. S. at 397), and that it was neither incongrous nor improper for Congress, in its discretion, to vest the power to appoint the officers in question in the federal judiciary rather than the President (*id.* at 398).

Certainly, the choice made by Congress in determining the composition of the Federal Election Commission also reasonably accommodates the diverse interests involved.

57. Thus, despite Article III, vesting the judicial power of the United States in the courts (in terms virtually identical with Article II, vesting the executive power in the President), Congress has created a number of "legislative" courts. Few would question that Congress may place some judicial power in non-Article III courts when it has a valid legislative purpose in doing so. *See generally*, Bator, Mishkin, Shapiro and Wechsler, "Hart and Wechsler's The Federal Courts and the Federal System," p. 396 (1973).

We submit that it avoids, rather than creates, the suggestion of impropriety.

As noted earlier, the Commission is bipartisan. Apart from its two *ex officio* members, the Secretary of the Senate and the Clerk of the House, it consists of two members nominated in the Senate, two nominated in the House, and two nominated by the President. Since the Commission's responsibilities relate to Presidential elections and to elections of the members of both Houses, the scheme can hardly be regarded as incongrous.

On the other hand, one might well question the wisdom of confining to the President alone the selection of those who are to be engaged in the supervision of the electoral process. The President is not only Chief of State; he is Chief of his Party. He may be, in addition, an announced candidate for reelection. To divide the authority to select the members of the Commission is to minimize potential conflicts of interest, to lessen the dangers of partisanship, and to strengthen public confidence that the law will be administered diligently and even-handedly.

CONCLUSION.

The Commission is an arm of the Congress and the method by which its members are selected is both constitutional and appropriate. The powers and functions which it has been delegated are likewise appropriate to its role.

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